JAN 3 1921
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In the Supreme Court of the United States

OCTOBER TERM, 1920

CARLISLE PACKING COMPANY,
a corporation,
Petitioner,

—vs—

OLE SANDANGER,
Respondent.

No. 6[redacted]1

Brief of Petitioner on Petition for Writ of Certiorari

JAMES A. KERR,
EVAN S. MCCORD,
JOSEPH N. IVEY,
Attorneys for Petitioner.

*Filed this*_____*day of November, 1920.*

JAMES D. MAHER, Clerk.

*By*_____*Deputy Clerk.*

LAW BRIEF PRINT SHOP—SEATTLE

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The facts are stated in the petition which accompanies this brief.

ARGUMENT

The respondent was injured while engaged in the performance of a maritime service upon a vessel owned by the petitioner while plying in Alaskan

waters. He instituted his action for such damages in the Superior Court of King County, Washington, a common law court, and sought to have his damages measured by the rules of the common law rather than by the rules of the admiralty courts of the United States. The petitioner in the trial court, as well as in the Supreme Court of Washington claimed immunity from liability for any elements of damage other than those elements of damages allowed under the maritime law in an action of this character.

The petitioner contended that the respondent was not entitled in any event to recover for any elements of damage other than his wages for the voyage, his doctor's bills, hospital charges and medical attendance and the cost of his cure. All of such claims were satisfied prior to the trial with the exception of the sum of $175.00. The petitioner paid for all of the doctor bills, hospital charges, medical attendance and cost of cure except the sum of $175.00, which was the total amount claimed by respondent on account of the items for which he could recover under the maritime law. A federal question was presented to the Supreme Court of Washington and passed upon by that court.

The court in its opinion says:

"It does seem that respondent's employment and service on the day in question was maritime in its nature. We shall so assume in our disposition of the case, without further discussion of that question."

And further the court says in its opinion:

"Proceeding upon the theory that this statute saves to suitors merely the right to sue in the common law courts and avail themselves of the procedure of those courts, and does not enable such suitors to avail themselves in those courts, any more than in the federal admiralty courts, of the rules of substantive common law as controlling of their rights; counsel for appellant invoke the principles of maritime law as announced by Mr. Justice Brown, speaking for the Supreme Court of the United States in The Osceola, 189 U. S. 158."

The immunity claimed under the maritime law was presented first upon a motion for an instructed verdict in favor of the respondent and against the petitioner for the sum of $175.00, being the maximum amount for all damages which the respondent could claim under the maritime law. Immunity was further claimed in the request for an instruction to the jury and later upon a motion for a new trial and motion for judgment *non obstante*. Immunity was further claimed by the briefs in the Supreme Court and was passed upon and considered by the Supreme Court. There can be no doubt that the question was properly raised.
Donohue vs. Vosper, 243 U. S. 59.

The work about which the respondent was engaged at the time of his injury was maritime in its nature. His employment was a maritime contract. The injuries received were likewise maritime and the rights and liabilities of the parties were matters clearly within the admiralty jurisdiction. The substantive rights of the respondent are controlled by the rules of maritime law. He had a choice of remedies. He could go into the common law courts or into the admiralty courts, at his election. He selected the common law court, and under the decision of the Supreme Court of Washington he was allowed to recover according to the rules of the common law. This court in *Chelentis vs. Luckenbach*, 247 U. S. 372, has held that:

"A contract of fireman on steamship is maritime in its nature and under the maritime law his recovery for injuries incurred while in the service of the ship is limited to wages, maintenance, and cure."

The respondent in this case, as the record shows, was a seaman and his contract was maritime. The *Chelentis* case is directly in point and expressly holds that in an action of this kind prosecuted in the common law courts, the plaintiff is limited to the amount of the recovery fixed by the maritime law. The entire subject is covered by the *Chelentis* case and by the case of *Southern Pa-*

cific Co. vs. Jensen, 244 U. S. 205. In the *Jensen* case, this court says:

"Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions (referring to Article III, Sec. 2 of the Constitution), Congress has paramount power to fix and determine the maritime law which shall prevail throughtout the country. And, further that, in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."

In the case of *Lottawanna*, 21 Wallace 558, this court said:

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

The Supreme Court of Washington, referring to the *Chelentis* case, says:

"A seaman was washed overboard, and his leg broken, as it was claimed, as a result of a negligent and improvident order given by a superior officer. It was held that he could not recover as for injuries received 'in consequence of the unseaworthiness of the ship' and therefore could not recover damages at all as for negligence. Plainly that was not a case of unseaworthiness of the ship."

We think the court was clearly in error in attempting to distinguish the *Chelentis* case from the case at bar. In the *Chelentis* case the liability of the defendant was predicated upon the negligence of a superior officer in giving an improvident order. In this case the liability was predicated upon the negligence of Stensland, the master of the ship, in doing an improvident or negligent act, in putting the gasoline instead of kerosene in the kerosene can. In both cases the gravamen of the charge was the negligence of the master; in the one case in the giving of an improvident order and in the other in doing an improvident act. It cannot even be plausibly urged that substitution of gasoline for kerosene was due to any other cause than that of the negligence of Stensland, the master of the vessel.

In the case, however, of the *Southern Pacific Company vs. Jensen, supra*, the plaintiff was operatting a small electric freight truck. His work consisted of driving the truck into the steamship El Oriente, where it was loaded with cargo, then driving the truck out of the vessel upon a gangway connecting the vessel with a pier in the river and thence upon the pier, where the lumber was unloaded from the truck. The vessel was about ten feet distant from the pier. Immediately before the accident he started out of the ship with his truck loaded with lumber, a part of the cargo of the steamship El Oriente. He stood on the rear of the truck, the lumber coming about to his shoulder. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide piece on the gangway. He then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber in front of him. His neck was broken and in this way he met his death. The injury would not have occurred had the opening to the gangway been higher. It might just as well have been contended in the *Jensen* case as in this case that the vessel was unseaworthy.

In the case at bar, the owner of the vessel furnished kerosene for use in the can for lighting the lamps on the vessel. The substitution of gasoline for kerosene in the can which was involved in the explosion resulting in the injury, was due unquestionably to a mistake or negligence of the master. We fail to understand how any question of unseaworthiness is involved in this controversy. Under the reasoning of the Supreme Court of Washington in this case, Jensen would have had the right to recover general damages in an action at law. This court held precisely the contrary. In the case of *Hanrahan vs. Pacific Transport Co.*, 262 Fed. 951, it was expressly held that the ship was not unseaworthy because of a temporary absence of a hand-rail while she was lying alongside the wharf discharging cargo, so as to entitle a seaman injured thereby to recover damages. A writ of certiorari in the *Hanrahan* case was denied by this court. (40 Supreme Court Reports, 345.) In that case the plaintiff was a member of the crew as in this case. The vessel being in port and fast to the pier, plaintiff returned at night from shore leave and while walking on the upper deck to his quarters, fell overboard, suffering personal injuries, for which he brought his common law action. The reason why he was injured was that by the negligence of

the ship's officers a certain hand-rail was not in place. This rail consisted of wire rope passing through stanchions, which were insertable in sockets built into the deck. It was erected to take the place of a bulwark. The court said that the jury might have found that the plaintiff's injuries were caused or contributed to by the absence of the hand-rail. Plaintiff asked to go to the jury on the theory that the vessel was unseaworthy by reason of the failure of those in charge of her to maintain the hand-rail in place. The court further said in the *Hanrahan* case:

"At the time of this accident, however, plaintiff's relation to defendant resulted from a maritime contract, viz., his hiring as a seaman. The scope and effect of such contract is defined and regulated solely by the maritime law, which is a different system of jurisprudence from the common law, and neither subordinated to nor controlled thereby." (Citing *Southern Pacific Co. v. Jensen, supra.*)

No definition of unseaworthiness announced by any of the courts is broad enough to include the conditions on board the vessel upon which respondent was injured. The injury to respondent resulted from the action of Stensland in putting gasoline in the can instead of kerosene. The present case cannot be distinguished from the *Chelentis* case.

Yet under the guise of alleged unseaworthiness the Supreme Court of Washington in its opinion disregards the holdings of this court in the *Chelentis* case, as well as the uniform holdings of the admiralty courts and refused to apply the rules of the maritime law as expounded by such courts and applied the rules of the common law instead of the rules of the maritime law as to the measure of respondent's damages. It is insisted, however, that the immunity is not claimed under the Constitution and laws of the United States for the reason that there is no express statutory authority fixing the measure of liability for injuries sustained by a seaman in the performance of a maritime contract.

In the case of *Tullock vs. Mulvane*, 184 U. S. 497, this court answers the contention that the immunity cannot be claimed in the absence of statutory regulation. In that case an action had been brought upon an injunction bond executed in an equity cause pending in a federal court. The injunction bond was sued upon in a state court of Kansas. Under the local law the plaintiff was entitled to damages for attorney's fees expended by him in the proceeding in which the injunction was issued. The Kansas court permitted a recovery for such attorney's fees, contrary to the rules determining the measure of damages or recovery upon an injunc-

tion bond in the federal courts. There was no statutory regulation upon the subject of injunction bonds in federal courts but the authority of the federal courts in establishing the rule as to measure of damages was an authority exercised under the laws of the United States. This court held that the amount of the attorney's fees could not be recovered even in a state court. The reasoning in that case is applicable to the facts in this case.

The admiralty courts have established a fixed rule as to the measure of damages in such cases. They did so under the Constitution and laws of the United States in the exercise of an authority thereunder. In the *Tullock* case this court says:

"It is insisted, however, that such is not the case because whilst it is true the courts of the United States exercise their authority under the Constitution and laws of the United States that as there is no express statutory authority regulating injunction bonds, therefore in determining the measure of liability on them no claim of immunity arising from an authority exercised under the United States can arise. But this is a mere form of restating the contention we have already disposed of. The test is not the particular source or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it."

Under the authority of *Tullock vs. Mulvane*, it is clear that the immunity was claimed under an

authority exercised under the laws of the United States, under Section 237 of the Judicial Code as amended September 6, 1916, 39 Stat. 726 C-448. The remedy of the petitioner is by writ of certiorari and not by writ of error. (*Philadelphia & Redding Coal Co. vs. Gilbert*, 245 U. S. 162.) It is true that the writ of certiorari is granted or refused in the exercise of a sound discretion. The petitioner is not entitled to the issuance of a writ as a matter of right, but we contend that in this case it should be granted in the exercise of a sound discretion. The questions embraced within the scope of this application are of vital importance to all who are engaged in shipping and maritime endeavors. Such questions involve matters of great importance to the public generally as well as the rights of litigants generally. It is necessary to have them properly determined in order that there may be uniformity in the decisions of the state courts in the interpretation and administration of the maritime law. Unless such questions are finally decided by this court, litigants can be deprived of their rights under the maritime law by applying the rules of the common law.

It is respectfully requested that this writ of certiorari be granted to the end that there may be

uniformity in the decisions of state courts in such cases and to the end that there may be uniformity between the state courts and the federal courts in the determination of the measure of damages for personal injuries sustained in the performance of a maritime contract.

EVAN S. McCORD,
JAMES A. KERR,
JOSEPH N. IVEY,
Attorneys for Petitioner.